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Supreme Court, U.S.
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No. 00-1729

In the

Supreme Court of the United States

Ann Bogren,

Petitioner,

v.

The State of Minnesota; Department of Public Safety; Donald Davis, Commissioner of the Department of Public Safety, in his official capacity; Minnesota State Patrol; Ann Beers, Chief of the State Patrol, in her official capacity;

Lieutenant Thomas Fraser of the State Patrol, personally and individually; and Lieutenant Lori Hodapp of the State Patrol, personally and individually; and Lieutenant Colonel Stephen Mengelkoch of the State Patrol, personally and individually,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

I. The judicial system will not be burdened by a rule of law that credits the EEOC's findings of discrimination violations, but by courts' determinations that discredit the agency and thereby discourage employers and employees from deferring to the EEOC's expertise and resolving the claims outside the court system.

The EEOC is not, as respondents contend, in the business of making probable cause findings and determinations of violations of Title VII in "loads" of "meritless" cases, so heavy as to cause the judicial system to "buckle" under the weight were the cases to be tried; the EEOC is in the business of carrying out Congress's intent that meritorious discrimination cases be identified by the EEOC's trained investigators and then resolved through the agency's conciliation process rather than through the court system. In *Occidental Life Insurance v. EEOC*, 432 U.S. 355, 367-368 (1977), the Court explained:

> When Congress first enacted Title VII in 1964 it selected 'cooperation and voluntary compliance. . . as the preferred means for achieving' the goal of equality of employment opportunities. To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.'. . . [U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating

claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

The Third Circuit, in *Burgh v. Borough Council of the Borough of Montrose*, 2001 U.S. App. LEXIS 10835, just recently relied upon *Occidental* to rule that the plaintiff's case was not barred by a state limitations statute where: the plaintiff's complaint of discrimination was docketed by the EEOC on March 20, 1995; the plaintiff retained an attorney, sometime prior to October 1998, who wrote a letter to the EEOC requesting the agency to issue a right-to-sue letter; the plaintiff received a right-to-sue letter from the EEOC on December 1, 1998; and the plaintiff filed suit three days later. The court reasoned that the limitations scheme provided for in Title VII – 90 days from receipt of the right-to-sue letter from the EEOC – is "consistent with Congress's intent that most complaints be resolved through the EEOC rather than by private lawsuits." Therefore, even though the plaintiff filed suit over three years after his complaint was filed with the EEOC, the court concluded the complaint was timely filed. Because "Congress wanted cooperation and voluntary compliance to be the primary means of resolving claims in an informal and noncoercive manner," the *Burgh* court preserved "this goal of resolving problems by conciliation," which it understood as "better met by enacting a limitations period for filing a court action that runs from the receipt of the right-to-sue letter at the end of the administrative process rather than from the date of the unlawful employment practice."

In addition to reducing the number of litigated cases through the settling of disputes by "conference, conciliation, and persuasion" in probable cause cases, the EEOC process also discourages litigation by complainants who defer to the EEOC's findings of no probable cause and forgo a pursuit of their claims in court. The EEOC can succeed in fulfilling its various roles only so long as it is perceived by employers and

employees as a respected, highly regarded agency, with acknowledged expertise in analyzing discrimination claims. Such a perception is hardly fostered by a federal court's determination, as in the petitioner's case, that no reasonable fact finder could find discrimination, where the EEOC has already found discrimination. Obviously, the opposite perception is fostered. The less the courts credit the EEOC's determinations, the less inclined employers will be to cooperate in the EEOC's conciliation and settlement procedures and to respond to employees' EEOC charges with accurate, precise, truthful statements.

Significantly, the State defendant did not respond to petitioner's EEOC charge with accurate, precise, truthful statements. Respondents assert that the State's misrepresentation to the EEOC that petitioner was "arrested" is a "mistaken" statement that "in no way affected respondents' decision and therefore, does not support petitioner's pretext argument" and is "in no way sufficient to find that respondents' asserted justifications for discharge were false." The mistaken statement, however, was the "first and foremost" justification the State gave to the EEOC for terminating the petitioner. (Petitioner's Appendix, at 101). Respondents' failure to attach any significance to the State's untruthful response to the EEOC, together with the State's failure to have taken a minimal amount of care in responding to petitioner's charge to give the EEOC honest, accurate reasons for petitioner's termination, reflect respondents' and the State's disregard for the EEOC investigative process and explain respondents' viewpoint that the EEOC is writing letters of violation and making probable cause determinations in "loads" of meritless cases. As this viewpoint, completely discrediting to the EEOC and completely unsupported, is the premise for respondents' position that an EEOC letter of violation does not at least mean that reasonable people could disagree whether an employer was motivated by a

discriminatory attitude, respondents' position is likewise unsupported.

Respondents' attempt to support their position through cases declining *per se* admissibility of EEOC findings fails because those cases focus on the probative value of the EEOC report versus the danger of unfair prejudice to one of the parties. Whether the report would be helpful to the jury or whether it is, for example, merely conclusory and therefore not helpful, *see Johnson v. Yellow Freight System, Inc.*, 734 F.2d 1304 (8th Cir. 1984), is a very different question than whether a finding in favor of the plaintiff demonstrates that a reasonable person reviewing the facts could find discrimination. In *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488 (9th Cir. 1986), the Ninth Circuit held that its rule of *per se* admissibility applicable to probable cause determinations did not apply to letters of violation, not because a letter of violation is not probative of discrimination, but rather, because it is such a definitive statement by the EEOC that a violation of federal law occurred that the admission of the finding could prejudice the employer. The court explained:

> The difference between [a probable cause determination and a letter of violation] becomes critical when considering the potential for prejudicial impact on a jury. In a letter of violation the EEOC concludes that a violation of Title VII has occurred, whereas in a probable cause determination the EEOC determines only that there is probable cause to conclude that a violation of Title VII has occurred. A finding of probable cause does not suggest to the jury that the EEOC has already determined that there has been a violation. . . . A letter of violation, however, represents a determination by the EEOC that a violation of the Act has occurred and thus

> results in a much greater possibility of unfair prejudice.

In *Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60 (2nd Cir. 1998), relying on *Gilchrist*, the court excluded the EEOC's finding of "insufficient evidence" because of the possibility of unfair prejudice to the plaintiff:

> In many respects, this finding – which amounts to essentially a finding of no probable cause – resembles a categorical legal conclusion akin to a letter of violation. A finding of probable cause states only that a case is a close one, whereas a finding of no probable cause, like a letter of violation, conclusively resolves the administrative charge.

Respondents also fail to support their position through their discussion of *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972). The court's ruling that an EEOC report is "to be given no more weight than any other testimony given at trial" is not relevant to the question petitioner has presented to the Court. Petitioner is not proposing that an EEOC letter of violation means a plaintiff wins her case at trial, but only that it must mean that reasonable people could disagree whether she should win her case.

II. The petitioner may raise before this Court the question whether the EEOC's letter of violation, finding that the evidence in petitioner's case establishes discrimination, precluded the Eighth Circuit's ruling that no reasonable fact finder could find discrimination.

Petitioner should be permitted to present to this Court the question whether the EEOC's letter of violation, finding that the evidence in petitioner's case establishes discrimination,

precluded the Eighth Circuit's ruling that no reasonable fact finder could find discrimination. Petitioner wrote her brief to the Eighth Circuit in November of 1999. In the brief, she clearly informed the court, in the statement of facts, that the EEOC had found a violation of discrimination law. Petitioner quoted from the EEOC's letter of violation. To petitioner's knowledge, the only Eighth Circuit case in which the court has ruled that an EEOC finding of probable cause precludes summary judgment is *Bassett v. City of Minneapolis*, 211 F.3d 1097 (8th Cir. 2000). The court had not yet decided this case at the time petitioner wrote her brief, though it was decided before oral argument and before the panel filed its decision on December 22, 2000. Relying on *Bassett*, petitioner raised the EEOC issue that she has raised to this Court in her *en banc* petition to the Eighth Circuit. Petitioner's *en banc* petition was denied on February 15, 2001. *Cervantes v. Walmart*, 2001 U.S. App. LEXIS 63 (10th Cir.), which created conflict within the Tenth Circuit, was decided on January 3, 2001. *Coleman v. Quaker Oats*, 232 F.3d 1271 (9th Cir. 2000), which created conflict within the Ninth Circuit and is in conflict with *Cervantes* and *Bassett*, was decided on November 20, 2000.

A criterion for this Court to grant a petition for certiorari is whether "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R.10(a). As petitioner explained in her petition, the Eighth Circuit panel in her case entered a decision in conflict with law in its own circuit and in other circuits, and there is conflicting law on this issue among the circuits and within the circuits. A second criterion for this Court to grant a petition for certiorari is whether an issue in the case is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R.10(c). As petitioner has discussed in this brief and in her petition, judicial rulings that no reasonable fact finder could find discrimination, where the

EEOC has found that the evidence "establishes" discrimination, will bring discredit to the EEOC and harm the EEOC's reputation and status, authority and influence, and ability to carry out its functions and achieve the goals that Congress set for the agency upon creating it. Whether courts should view EEOC findings of violations as "demonstrat[ing] that upon distillation of all the evidence presented, reasonable minds could disagree over the material fact of . . . intentional discrimination," *Bassett*, or, at a minimum, discuss the EEOC report and the court's reasons for affording it no weight, *see Cervantes*, is an important federal question requiring uniformity within and among the circuits.

III. Respondents' defense of the panel's decision, through a misunderstanding of settled principles of law concerning the standard of review of a motion for summary judgment and the standard of appellate review of a grant of summary judgment, along with a failure to give credence to evidence favoring petitioner while crediting evidence favoring defendants, highlights the panel's departure from the accepted and usual course of summary judgment proceedings, as confirmed in *Reeves v. Sanderson*.

In disagreeing with petitioner that the panel's method of analyzing the petitioner's case violated *Reeves*, respondents proceed from a faulty understanding of the summary judgment standard and the standard for appellate review of a district court's grant of summary judgment. Respondents erroneously assert that "this Court cannot take away the trial court's function of weighing the evidence," and the panel "could not duplicate the district court's function by making its own determination of facts and reversing even if it would have decided the case differently." Respondents disregard that appellate review of the district court's grant of summary judgment is *de novo*. Respondents also disregard that a court

deciding a summary judgment motion is decidedly not a fact finder and absolutely not permitted to weigh the evidence. *Reeves v. Sanderson*, 530 U.S. 133, 150-151 (2000); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990). Clearly, the panel was required to make its own determination whether the petitioner's case presented genuine issues of material fact to be decided by the jury. And clearly, as petitioner asserted in her brief, the panel was required by *Reeves* to discount all evidence favorable to the defendants that the jury is not required to believe and to give credence to the evidence favoring the petitioner and only to the evidence supporting defendants that is "uncontradicted and unimpeached, at least to the extent that it comes from disinterested witnesses." *Reeves.*

Respondents answer the petitioner's question to the Court whether the panel so far departed from the usual and accepted course of summary judgment proceedings by simply reciting the alleged "deficiencies" that were suddenly attributed to petitioner and suddenly documented when respondents and the State took advantage of the teacup incident to fire the petitioner. Respondents fail to acknowledge the evidence favoring petitioner, creating genuine issues of material fact, and fail to reconcile all of this evidence with their repeated conclusion that petitioner presented no evidence from which a reasonable fact finder could disbelieve the respondents' justifications for her termination. For example, respondents attack the petitioner's credibility in the accident reporting incident but fail to respond to the fact that the white female trooper's credibility was accepted over the petitioner's credibility. Respondents accuse the petitioner of being evasive and untruthful in the investigation, but fail to respond to petitioner's evidence that Fraser's conclusions were based on the word of Johnson, and fail to look beyond Fraser's accusations to see that petitioner was not untruthful in responding to Fraser's questions, even those questions designed to probe into the petitioner's personal and private

life in search of some reason to fire her. Respondents allege that petitioner presented no evidence that any false accusations of dishonesty were discriminatory, but fail to account for petitioner's evidence that white probationary troopers' credibility was routinely accepted, while petitioner's credibility was routinely and automatically doubted. Respondents defend their "business judgment" in firing the petitioner based upon their "concern" that petitioner might present a disciplinary problem after certification due to her conduct in dropping the teacups, but fail to explain their lack of concern for the future disciplinary problems of the white male trooper who grabbed the citizen's neck and threatened him or the white male trooper who pushed the citizen's head toward the steering column to teach him a lesson about seat-belts. Respondents maintain that they did not have to take the "chance" that petitioner would "improve" when certified, though fail to acknowledge her solid performance record and fail to explain why they were not taking any chances in retaining the white male trooper who responded to an accident scene intoxicated or the white male troopers with the citizen complaints about on-duty intimidating and threatening behavior toward motorists.

Respondents also contend that the petitioner expected the panel to fault defendants for "fail[ing] to credit the many positive comments in her performance evaluations," whereas petitioner asserted that the panel had to consider the comments in her performance evaluations that proved the alleged after-the-fact "deficiencies" could not have been true. Respondents contend that petitioner's commendation in the academy by her instructors for her "outstanding driving skills" is meaningless because field performance occurs at a "real life pace" and "does not allow for artificial protections," but nothing in the record supports respondents' disparagement of petitioner's commendation and nothing suggests that petitioner received the commendation for anything other than "real life" driving in a "real life" car.

Respondents also misrepresent petitioner's performance evaluations by characterizing the evaluations as illustrative of petitioner's "inadequacies" and as "establish[ing]" that petitioner was not as capable a trooper in the field, when the petitioner received nine scores of "above average," 24 scores of "satisfactory," and only two scores of "unsatisfactory" in a total of 35 scores.

Finally, respondents do not begin to acknowledge petitioner's evidence of the discriminatory attitudes of Fraser and Hodapp and the evidence of discrimination toward black troopers in the Patrol, as detailed by Mel Lockhart. Respondents do not even mention Mel Lockhart's name, and yet they cast aside petitioner's statistical evidence as merely "generic" and make conclusory arguments, with no analysis of the evidence, that statistical evidence "will rarely suffice to rebut an employer's legitimate, nondiscriminatory reasons for a particular adverse employment action." Respondents' arguments are circular. The whole point of petitioner's statistical evidence, in conjunction with the evidence of the State's discriminatory treatment of Lockhart and the other black troopers, was to prove the discriminatory motives behind the State's and respondents' adverse treatment of the petitioner. Petitioner clearly did not have to first prove the discriminatory motives in order for the court to consider the evidence proving those motives.

Summary judgment should not be granted "unless the evidence could not support any reasonable inference of discrimination." *Keathley v. Ameritech*, 187 F.3d 915, 919 (8th Cir. 1999). "The court must draw all reasonable inferences in favor of the nonmoving party." *Reeves*, at 150. In Judge Lay's words, in his dissenting opinion in *Heaser v. Toro Co.*, 247 F.3d 826, 834 (8th Cir. 2001):

> [I]n order to grant summary judgment all the evidence must point one way and be susceptible of no reasonable inferences sustaining the position of

> the non-moving party. The obvious corollary to this principle is that a motion for summary judgment requires the facts to be viewed in the light most favorable to the plaintiff by affording a plaintiff the benefit of all factual inferences. These settled principles of law need no citation.

As the *Paolitto* court explained, a letter of violation "conclusively resolves the administrative charge" in favor of the employee, and a finding of probable cause means that a case is "a close one." By definition, cases in which violations are close calls or are conclusive survive a correct application of the summary judgment standard. While the panel did not misstate the applicable legal standards, as the respondents did, the panel nevertheless failed to apply the correct standards it stated. Drawing all inferences and resolving all factual issues in favor of the defendants; giving credence to the evidence favoring the defendants that was not uncontradicted, did not come from disinterested witnesses, and the jury was not required to believe; and failing to give credence to the evidence supporting the petitioner, the panel departed from the accepted and usual course of judicial proceedings. The petitioner respectfully submits that the reasons she has set forth in her petition and in this brief, in request of the Court's grant of review on a writ of certiorari, are compelling Petitioner respectfully requests the Court to grant her petition.

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